

# Monitoring women's socio-economic equality under ICESCR

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# **MONITORING WOMEN'S SOCIO-ECONOMIC EQUALITY UNDER ICESCR**

## **Abstract**

Little attention has been paid to the monitoring tools of women's socio-economic rights (SER). Can the established monitoring tools used by the Committee on Economic, Social and Cultural Rights (CESCR) be reformed to detect all the ways women's SER are undermined or is it more conceptually sound to establish a new gender equality monitoring standard? This article argues for both approaches. Incorporating a gender equality framework into traditional monitoring tools enriches accountability. To detect the complex ways women experience violations of their SER it is necessary to develop an independent evaluative tool. This article proposes that Fredman's four dimensional model of equality be used for monitoring women's rights under ICESCR.

## **Biography**

Meghan Campbell is the Weston Junior Research Fellow at New College, University of Oxford and the Deputy-Director of the Oxford Human Rights Hub. Her current work investigates how the international human rights framework can address entrenched and emerging issues of gender equality and the nature and scope of the legal obligation to co-operate realize human rights. She has lectured at Oxford University on human rights, labour, administrative and constitutional law. She runs the graduate programme on Oxford Legal Assistance.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>1</sup> has an ambivalent position to women's equality. On one hand, Article 2(2) provides that socio-economic rights are guaranteed without discrimination on the basis of sex and Article 3 specifically requires states to ensure men and women equally enjoy socio-economic rights. On the other hand, gender assumptions permeate ICESCR: for example, the right to an adequate standard of living is based on the male breadwinner model.<sup>2</sup> The Committee on Economic Social and Cultural Rights (CESCR) through an evolutionary interpretation has made strides in dismantling the male bias in ICESCR<sup>3</sup> and is working towards engendering socio-economic rights.<sup>4</sup> This process, however, is only just beginning and much remains to be done.

Up till this point, the focus has been on reshaping the normative content of socio-economic rights so that ICESCR better responds to women's experiences.<sup>5</sup> Less attention has been paid in developing monitoring tools to assess if the state has fulfilled its obligations under Article 2(2) and Article 3 of ICESCR. Without explicitly considering the state's implementation of women's socio-economic rights, there is a real risk that gender inequalities will remain invisible. Achieving gender equality is complex. Measures designed to promote women's socio-economic rights can in effect perpetuate gender stereotypes or re-entrench disadvantage. It is imperative to carefully evaluate the implementation of women's socio-economic rights.<sup>6</sup> This article asks: what monitoring standards need to be reformed or developed by CESCR to ensure that women are equally able to enjoy their socio-economic rights?

Asking this question opens the Pandora's Box of measuring compliance with socio-economic rights. Chapman warns that 'monitoring state compliance is a complex and exacting process with numerous political and methodological pre-requisites.'<sup>7</sup> CESCR has pioneered the concept of the minimum core and with the adoption of the Optional Protocol to ICESCR (OP-ICESCR) it is now poised to contribute to the development of the reasonableness standard.<sup>8</sup> All of these standards have been praised and criticized. But none of these evaluative tools have been designed to capture gender inequalities and the relationship between monitoring ICESCR and equality has largely been unexplored. Can gender equality be integrated into established monitoring standards or is it more conceptually sound to establish a new and separate monitoring standard? This article argues that both approaches should be simultaneously pursued. Enriching the current monitoring approaches with equality is essential to uphold women's socio-economic rights. For both principled and pragmatic reasons, it is also necessary to develop a separate equality monitoring tool so as to be able to identify *all* the ways women experience violations of their socio-economic rights. While there have been prior proposals for monitoring gender equality under ICESCR, this article proposes that

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<sup>1</sup> 993 UNTS 3 (entered into force 3 January 1976).

<sup>2</sup> *ibid.* Article 11.

<sup>3</sup> CESCR, 'General Comment No. 16: The equal rights of men and women to the equal enjoyment of economic, social and cultural rights' (2005) E/C.12/2005/4.

<sup>4</sup> Sandy Fredman, 'Engendering Socio-Economic Rights' (2009) 25(3) SAJHR 409, 409.

<sup>5</sup> *ibid.*; Leilani Fahra, 'Is there a Woman in the House? Re/conceiving Women's Right to Housing' (2002) 14 Can J Women & L 118.

<sup>6</sup> Dianne Otto, "'Gender Comment' Why Does the Committee on Economic, Social and Cultural Rights Need a General Comment on Women?" (2002) 14 Can J Women & L 1, 43-51.

<sup>7</sup> Audrey R. Chapman, 'A 'Violations Approach' for Monitoring ICESCR' (1996) 18 HRQ 23, 24.

<sup>8</sup> A/RES/63/117 (entered into force 5 May 2013).

Fredman's four dimensional model of substantive equality offers the ideal framework for CESCER to employ.<sup>9</sup>

The article begins by providing context on the role of CESCER in ensuring compliance with ICESCER. The second part maps CESCER's current approach to monitoring to understand how equality can fit into this process. The third part explains that even though CESCER has made reference to certain aspects of gender equality, there is still a need for gender sensitive monitoring standards. The fourth part analyses how the various monitoring standards are able to grapple with gender inequality in the implementation of socio-economic rights. It argues that incorporating gender equality into the current evaluative tools *and* developing an independent equality monitoring framework are necessary to detect the complex ways women experience violations of their socio-economic rights. The fourth part, using Fredman's four dimensional model of substantive equality, sketches the contours of an equality-based standard and concludes by demonstrating how this can enrich the monitoring of ICESCER.

## *I. The Role of CESCER*

CESCER is not a judicial body.<sup>10</sup> This formal position belies the important authoritative role that CESCER can play in developing socio-economic rights. The guarantees in ICESCER are open-textured and CESCER provides guidance so that states know the scope of their obligations.<sup>11</sup> Through a multi-faceted accountability structure, CESCER shines an analytical spotlight on places where the state has not fully implemented ICESCER. Through engaging in constructive dialogue with the state, civil society organisations and now under the OP-ICESCER, the individual, CESCER proposes recommendations on how to best implement ICESCER.

### *(i) General Comments*

Although the General Comments are the preeminent method for CESCER to elucidate ICESCER, there is no reference to the General Comments in the treaty. Upon a standing request from the UN Economic and Social Council, CESCER has drafted numerous General Comments on the obligations in ICESCER. The General Comments develop the legal obligations in the treaty, identify barriers to socio-economic rights and share information on best practices.<sup>12</sup> CESCER explains that the goal is to provide a detailed analysis of specific rights in ICESCER and assist states in fulfilling their obligations.<sup>13</sup> The General Comment do not merely provide a conceptual analysis of ICESCER, states are directed to respond to the General Comments in the periodic reporting process.<sup>14</sup> The accountability mechanisms are meant to form a coherent and harmonious structure. Thus, the

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<sup>9</sup> Otto, *supra* note 6 at 45-51; Christine Chinkin, 'Gender and Economic, Social and Cultural Rights' in Eibe Riedel et al *Economic Social and Cultural Rights in International Law* (OUP, 2014) 157-58.

<sup>10</sup> Walter Kalin, 'Examination of state reports' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 35.

<sup>11</sup> Urfan Khaliq and Robin Churchill, 'The protection of socio-economic rights: a particular challenge?' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 205.

<sup>12</sup> Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 125.

<sup>13</sup> CESCER, 'Report on the Forty-Fourth and Forty-Fifth Session' E/2011/22-E/C.12/2010/3' [55].

<sup>14</sup> Report of Secretary General, 'Compilation of Guidelines on the Form and Content of Reports to Be Submitted By States Parties to The International Human Rights Treaties' (2009) HRI/GEN/2/Rev.6 [29].

standards and monitoring approaches articulated in the General Comments should filter into the remaining accountability mechanisms.

(ii) *Periodic Reporting Process*

Under Article 16 and 17 of ICESCR states must submit a report to CESCER ‘outlining the factors and difficulties affecting the degree of fulfilment’ of socio-economic rights. State reports are notorious for being incomplete and self-congratulatory.<sup>15</sup> To supplement these shortcomings, CESCER encourages CSOs to submit shadow reports. CESCER conducts a written and oral dialogue session with the state. The Concluding Observations highlights positive areas of development, expresses areas of concerns and provides recommendations. This process is designed to be self-reflective, to facilitate meaningfully dialogue between CESCER, the state and CSOs and encourage good practices.<sup>16</sup>

(iii) *Optional Protocol*

Under the Optional Protocol, CESCER *examines* complaints that the state has violated ICESCR.<sup>17</sup> Unlike the General Comments and Concluding Observations, the OP-ICESCR mandates that the CESCER assess these complaints on the basis of reasonableness. CESCER does not release legally binding judgments but communicates its *views* and provides recommendations. There is a process for inter-state communications and an inquiry procedure into grave and systemic violations of ICESCR but this has not yet been utilized.<sup>18</sup>

## II. A Multi-Faceted Approach to Monitoring

With this contextual backdrop in place, the first step in assessing the best practice for CESCER to monitor women’s socio-economic rights is to analyze CESCER’s approach to monitoring ICESCR. CESCER employs a multi-faceted strategy, as it uses several different standards. Arguably it is also incoherent and conceptually confusing as CESCER has not provided any theoretical explanations for how these standards operate together. In part, this is because each of the evaluative tools used by CESCER is in response to different critiques of socio-economic rights. There was never any over-arching design or plan on how to best monitoring the implementation of ICESCR and the result is an often perplexing array of monitoring standards. Equally challenging, there is a disconnection between the standards set in the text of the treaty, those advocated for in the General Comments and monitoring in the Concluding Observations and Individual Communications.

This section briefly sketches the various standards drawn upon by CESCER, the critiques of each, and the relationship between these different monitoring tools. The aim isn’t to resolve these debates but to map out the different approaches so as to have the necessary base to understand the role equality plays in monitoring ICESCR. It uses the two latest General Comments from 2016 on the right to just and fair working conditions and the right to sexual and reproductive health, the Concluding Observations from the March 2016 reporting round (Canada, Kenya and Namibia) and the two decisions decided on their merits under OP-ICESCR. Only these latest outputs for CESCER

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<sup>15</sup> *ibid* at para 22-32; Philip Alston and Ryan Goodman, *International Human Rights* (OUP, 2013) at 768.

<sup>16</sup> CESCER, General Comment No. 1 Reporting by State Parties’ (1989) E/1989/22; Kalin *supra* note 12 at 39-40.

<sup>17</sup> Article 8, OP-ICESCR

<sup>18</sup>*ibid*, article 10-11.

are used; while this limits the extent of the conclusions and forecloses an evolutionary assessment, it does give a detailed snapshot of CESCR's current approach.

(i) *Maximum Available Resources and Progressive Realization*

The starting point is Article 2(1) of ICESCR. It holds that: 'each state...undertakes to take steps...to the *maximum of its available resources*, with a view to *achieving progressively the full realization* of [socio-economic] rights.' First, under maximum available resources CESCR needs to ascertain the entire resources of the state and assess how much of these resources should be devoted to the realization of socio-economic rights.<sup>19</sup> Second, under the progressive realization element CESCR needs to develop benchmarks and indicators to assess if the state has moved sufficiently fast enough to fully realize socio-economic rights. Progressive realization recognizes that it may take time to fully realize socio-economic rights.<sup>20</sup> While it is a necessary 'flexibility device',<sup>21</sup> it still imposes an obligation to immediately or within a reasonably short time take concrete 'steps towards' realizing socio-economic rights.<sup>22</sup>

In the General Comments, CESCR only makes passing reference to this standard. Under the heading of "maximum available resources", CESCR expresses concern about Canada's stagnating levels of social spending and low corporate tax rates<sup>23</sup> and in relation to Kenya on levels of corruption in the public sector, illicit financial flows and tax avoidance.<sup>24</sup> There is no reference to maximum available resources in the Concluding Observations for Namibia. A fully developed maximum available resources test would involve a detailed analysis of the resources and budget of the state to determine if a sufficient portion of its resources were directed towards socio-economic rights, not merely flagging areas of under-spending or corruption. In respect to progressive realization, CESCR only recommends that Canada, Kenya and Namibia 'take steps to progressively develop and apply appropriate indicators on the implementation of economic, social and cultural rights'.<sup>25</sup> This falls far short of the robust analysis required under Article 2(1) of ICESCR. As has been noted before, this is because these are highly contextualized standards. The time and energy needed to assess both the maximum available resources and the progressive realization for each of the 164 states parties to ICESCR is beyond the capacity of CESCR.<sup>26</sup> Therefore, CESCR has developed other tools to ensure states are held accountable under ICESCR.

(ii) *Minimum Core and Core Obligations*

In partial response to concerns that socio-economic rights are imprecise and only programmatic, CESCR pioneered the concept of the minimum core.<sup>27</sup> CESCR holds that there is a 'minimum core

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<sup>19</sup> David Bilchitz, *Poverty and Fundamental Rights* (CUP, 2008).

<sup>20</sup> CESCR, 'General Comment No. 3: The nature of the state's obligation' (1990) Fifth Session, [9]

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> CESCR, 'Concluding Observations: Canada' (2016) E/C.12/CAN/CO/6 [9]-[10].

<sup>24</sup> CESCR, 'Concluding Observations: Kenya' (2016) E/C.12/KEN/CO/2-5 [17]-[18]

<sup>25</sup> *ibid.* [65]; 'Concluding Observations: Canada' (n 23) [62]; CESCR, 'Concluding Observations: Namibia' (2016) E/C.12/NAM/CO/1 [78].

<sup>26</sup> Chapman *supra* note 7 at 28.

<sup>27</sup> Craig Scott and Patrick Mecklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141U of Penn L Rev 1; Sandra Fredman, *Human Rights Transformed* (OUP, 2008) at 84.

obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the right.<sup>28</sup> It illustrates the concept by holding that when a significant number of individuals are deprived of food, primary health care, housing and basic education then the state is in violation of the minimum core obligation under ICESCR.<sup>29</sup>

The concept of the minimum core has been contentious in theory and practice. Proponents argue that it gives a determinacy to socio-economic rights.<sup>30</sup> It provides a litmus test.<sup>31</sup> To achieve this aim it is necessary to articulate what is meant by “minimum.” There have been various proposals, the most prominent being survival, dignity and consensus-based. In her seminal critique of the minimum core, Young argues that these definitions are insufficient. Focusing on the minimum socio-economic rights necessary for survival conceptualizes a very narrow understanding of life and ‘misses the connection between dignity and human flourishing.’<sup>32</sup> However, equating the minimum core to dignity is equally problematic as dignity is an elusive concept that cannot be easily defined, making it difficult to determine what minimum level of socio-economic rights are necessary for a dignified life.<sup>33</sup> In respect to consensus-based definitions, aside from the methodological concerns on determining consensus, it connects the minimum core to the lowest common denominator.<sup>34</sup> Attempts to concretize the minimum core rather than providing guidance have only lead to further problems.

Although CESCR has historically been at the vanguard of the minimum core, in practice CESCR has not truly applied this doctrine. There is no reference to the minimum core in the Concluding Observations. In the General Comments on the right to just and fair working conditions and the right to sexual and reproductive health, the CESCR holds that ‘state parties have a *core* obligation to ensure, at the very least, *minimum* essential levels of satisfaction of the right...’<sup>35</sup> CESCR, in effect, is by-passing the debates on the content of the minimum core by omitting to tie it to any normative standard.

Instead CESCR lists core obligations for specific socio-economic rights. Core obligations ‘outline the necessary steps of “operationalizing” rights...[and] seeks...to signal violations under [ICESCR].’<sup>36</sup> The core obligations approach has been criticized as being ad-hoc and following ‘a meandering course of logic.’<sup>37</sup> The core obligations for the right to just and fair working conditions include: combating gender discrimination and harassment at work; establishing minimum wages; developing a health and safety policy; enforcing minimum working standards.<sup>38</sup> In respect to sexual and reproductive health, CESCR holds the core obligations include: repealing laws that criminalize access to sexual and reproductive health services; universal and equitable access to sexual and reproductive health service; legal prohibitions on gender-based violence; preventing unsafe

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<sup>28</sup> ‘General Comment No. 3’ supra note 20 at 10.

<sup>29</sup> *ibid* at para 10.

<sup>30</sup> Bilchitz, *Fundamental Rights* supra note 19 at 162.

<sup>31</sup> Katharine G. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *The Yale J of Int’l L* 113, 121.

<sup>32</sup> *ibid*. 130.

<sup>33</sup> *ibid*. 135.

<sup>34</sup> Chapman supra note 7 at 148.

<sup>35</sup> CESCR, ‘General Comment No. 22: The right to sexual and reproductive health’ (2016) E/C.12/GC/22 [49]; CESCR, ‘General Comment No. 23: The right to just and fair working conditions’ (2016) E/C.12/GC/23 [65].

<sup>36</sup> Young supra note 31 at 152.

<sup>37</sup> *ibid*. 154.

<sup>38</sup> ‘General Comment No. 23’ supra note 35 at [65].

abortions; access to comprehensive sex education; provision of medicines, equipment and technology for sexual and reproductive health; and access to remedies for violations.<sup>39</sup> It is difficult to discern a coherent explanation that unites the different facets of the core obligation, especially when comparing the core obligations between the right to just and fair working conditions and the right to sexual and reproductive health.

In the Concluding Observations, CESCR does not explicitly use the term but it does express concern that states are not fulfilling various core obligations identified in the General Comments. However, it does not consistently evaluate state's compliance with the core obligation. While for Canada, Kenya and Namibia, CESCR expressed concern about minimum wage, there is no reference to harassment at work.<sup>40</sup> In respect of sexual and reproductive health, in Canada and Kenya it raised the issue of access to abortion, but not in Namibia.<sup>41</sup> In Kenya, CESCR discussed sex education and the cost of giving birth, it held Canada to task for the cost of contraception and in Namibia it focused on HIV/AIDS and sterilization.<sup>42</sup> There has recently been tension in Canada between religious groups and the state on the delivery of sex education<sup>43</sup> and there is limited access to abortion in Namibia,<sup>44</sup> so it is surprising that these issues, identified as core obligations in the General Comments, were not discussed by CESCR in the Concluding Observations.

### (iii) *Respect, Protect and Fulfil*

Traditionally, civil and political rights were conceptualized as exclusively creating negative duties of restraint while socio-economic rights imposed positive duties. A significant amount of scholarship and case law has debunked the distinction between civil and political rights and socio-economic rights and has shown that both types of rights give rise to negative and positive duties.<sup>45</sup>

CESCR, adopting Shue's typology,<sup>46</sup> holds that each right gives rise to duties to respect, protect and fulfil. This was first used by CESCR in 1999, in the General Comment on the right to food.<sup>47</sup> Using sexual and reproductive health as an example; the duty to respect 'requires the state to refrain from directly or indirectly interfering with individual rights.'<sup>48</sup> For instance, states need to decriminalize same-sex sexual activity. The duty to protect 'requires states to take measures to prevent third parties from directly or indirectly interfering with rights.'<sup>49</sup> This includes regulating the conduct of private healthcare facilities, insurance and pharmaceutical companies. And finally, the duty to fulfil 'requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right.'<sup>50</sup> This requires, *inter alia*, the state to

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<sup>39</sup> 'General Comment No. 22' supra note 35 at para 49.

<sup>40</sup> 'CO: Canada' supra note 23 at 25; 'CO: Kenya' supra note n 24 at para 29; 'CO: Namibia' supra note 25 at para 34.

<sup>41</sup> 'CO: Canada' supra note 23 at para 51; 'CO: Kenya' supra note 24 at para 53.

<sup>42</sup> 'CO: Canada' supra note 23 at para 51; 'CO: Kenya' supra n 24 at para [53]; 'CO: Namibia' supra note 25 at 67.

<sup>43</sup> Pete Baklinski, 'Christian private school rejects Wynne's sex-ed as "perverse"' (14 July 2015) <<https://www.lifesitenews.com/news/christian-private-school-rejects-wynnes-sex-ed-as-perverse>>.

<sup>44</sup> Jack Kenyon, 'The Abortion Discussion' (8 August 2014)

<<http://www.namibian.com.na/index.php?id=126629&page=archive-read>>.

<sup>45</sup> Fredman, *Human Rights Transformed* (n 27); Plattform 'Arzte für ein Leben' v Austria (1991) 13 EHRR 204.

<sup>46</sup> Henry Shue, *Basic Rights* (PUP, 1980) 51.

<sup>47</sup> CESCR, 'General Comment No. 12: The right to adequate food' (1999) E/C.12/199/5.

<sup>48</sup> 'General Comment No. 22' supra note 35 at para 40.

<sup>49</sup> Ibid at para 42.

<sup>50</sup> Ibid at para 45.



eradicate barriers such as the cost to sexual and reproductive health care and to address prejudices on menstruation, pregnancy, masturbation, sexuality and fertility.

In the General Comment on sexual and reproductive health, CESCR links this typology to violations under ICESCR. Under the heading “Violations”, CESCR uses the respect, protect and fulfil model to illustrate how the state is in contravention of the treaty. Chapman has argued for a separate violations approach to ICESCR that looks at the: (i) actions of the state (ii) patterns of discrimination and (iii) failure to fulfil the minimum core, but CESCR has not adopted this model.<sup>51</sup> Going a step further, CESCR connects the obligation to fulfil to the progressive realization standard: “violations of the obligation to fulfil also occur where States fail to *progressively* ensure sexual and reproductive health facilities, goods and services available.”<sup>52</sup> The link between obligations to fulfil and progressive realization are not explored in detail. Connecting these two standards can be deeply problematic as many of the obligations to fulfil are closely related to gender equality, such as maternal health care, which are an immediate obligation.<sup>53</sup> This tension is explored further in Section IV. Confusingly, in the General Comment on just and fair working conditions, CESCR does not use the typology of duties but rather identifies “Violations” as acts of commission and omission.<sup>54</sup>

In the Concluding Observations, similar to core obligations, there is no direct reference to the obligation to respect, protect and fulfil. However, CESCR does appear to draw on this typology. The General Comment on the right to just and fair work requires, as part of the obligation to protect, requires the state to pass laws on the minimum wage<sup>55</sup> and in the Concluding Observations for Canada, Kenya and Namibia, CESCR makes a similar recommendation.<sup>56</sup> It echoes the obligation to fulfil as explained in the General Comment on sexual and reproductive health when it recommends that Kenya provide sex education and that Namibia focus on delivering HIV services.<sup>57</sup> But like the core obligations, CESCR does not consistently hold states accountable to the obligation to respect, protect and fulfil. There is no reference to the state regulating health care and pharmaceutical companies in the Concluding Observations which CESCR identifies as an obligation to protect.

#### (iv) Reasonableness

The OP-ICESCR empowers the individual to hold the state accountable for failing to uphold the rights in ICESCR. Under Article 8(4) when deciding the individual claim, CESCR ‘shall consider the reasonableness’ of the state’s actions in implementing ICESCR and ‘shall bear in mind that the [state] may adopt a range of policy measures.’ This introduces an additional monitoring standard: reasonableness. It was adopted to ensure that CESCR did not unduly interfere with the state’s economic, social and cultural laws, budgets and policies.<sup>58</sup>

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<sup>51</sup> Chapman *supra* note 7 at para 43.

<sup>52</sup> ‘General Comment No. 22’ *supra* note 35 at para 62 [emphasis added].

<sup>53</sup> UN Working Group on Discrimination Against Women in Law and Practice, ‘Discrimination against women in economic and social life, with a focus on economic crisis’ (2014) A/C/26/39 [8].

<sup>54</sup> General Comment No. 23 *supra* note 35 at paras 77-80.

<sup>55</sup> *ibid* at para 59.

<sup>56</sup> CO: Canada’ *supra* note at para 25; ‘CO: Kenya’ *supra* note 24 at para 29; ‘CO: Namibia *supra* note 25 at para 34.

<sup>57</sup> ‘CO: Kenya’ *supra* note 24 at para 53; ‘CO: Namibia *supra* note 25 at para 67.

<sup>58</sup> Malcolm Langford, ‘Closing the Gap? –An Introduction to OP-ICESCR’ (2009) 27(1) Nordic J of Hmn Rts 2, 25.

Reasonableness in the context of socio-economic rights has been primarily developed by the South African Constitutional Court. In a series of cases, the Court has fleshed out the reasonableness standard to include: ‘the levels of rights provisions, speed of progressive realisation and budget appropriations... planning, monitoring, meaningful engagement and prioritisation of vulnerable’ groups.<sup>59</sup> Critics argue that this standard is too deferential to the state and does not adequately define the content of socio-economic rights.<sup>60</sup> There have been concerns that reasonableness has resulted in the proceduralisation of socio-economic rights.<sup>61</sup> Proponents argue that it is sufficiently robust. Porter notes that ‘the reasonableness standard imposes obligations on all actors to make decisions that are consistent with a firm commitment to the progressive realization of [socio-economic rights]’<sup>62</sup> while Liebenberg and Quinot hold the state needs to adopt ‘a rights-conscious policy, planning and budgeting process.’<sup>63</sup>

CESCR has not had much opportunity yet to apply this new standard. It has only decided two individual communications and in neither case did CESCR articulate a fully-fleshed out conception of reasonableness. In *IDG v Spain*, it determined that there were other possible measures the state could have taken to provide notice regarding the enforcement of a mortgage.<sup>64</sup> In *Rodríguez v Spain*, CESCR held that reducing a prisoner’s non-contributory disability benefit by an amount equivalent to the cost of his upkeep in prison was not a violation of ICESCR.<sup>65</sup> It noted that the reduction is a reasonable means of allocating state resources.<sup>66</sup>

Prior to the OP-ICESCR coming into force, CESCR held that in reviewing the state’s measures on the grounds of reasonableness it will assess whether the:

- Measures are targeted towards the fulfilment of ICESCR
- Measures are non-discriminatory
- Allocation of resources in accordance with international human rights standards
- Measures are the least restrictive
- Measures are taken in a reasonable time frame
- Measures take account of disadvantaged and marginalized groups
- State prioritised grave situations
- Measures are transparent and participatory<sup>67</sup>

#### (v) *The Relationship Between Monitoring Standards*

<sup>59</sup> Brian Griffey, ‘The “Reasonableness Test” for Assessing Violations Under OP-ICESCR’ (2011) 11(2) HRLR 257, 316.

<sup>60</sup> Bilchitz, *Fundamental Rights* (n 19) Chapter 5.

<sup>61</sup> Dennis Davis, ‘Adjudicating the Socio-Economic Rights in the South African Constitution: Towards “Deference Lite”?’ (2006) 22 SAJHR 301; Marius Pieterse, ‘Coming to Terms with Judicial Enforcement of Socio-economic Rights’ (2004) 20 SAJHR 383, 410-1.

<sup>62</sup> Bruce Porter, ‘Re-thinking Progressive Realization: How Should it be Implemented in Canada?’ (2015) Social Rights Advocacy Centre 7

<<http://www.socialrights.ca/documents/publications/Porter%20Progressive%20Implementation.pdf>> .

<sup>63</sup> Geo Quinot & Sandra Liebenberg ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa’ (2011) 22(3) *Stellebosch L Rev* 639, 641.

<sup>64</sup> (2015) E/C.12/55/D/2/2014.

<sup>65</sup> (2016) E/C.12/57/D/1/2013.

<sup>66</sup> *Ibid* at para 13.3.

<sup>67</sup> CESCR, ‘An Evaluation of the Obligations to Take Steps to the “Maximum of Available Resources” under OP-ICESCR’ (2007) E/C.12/2007/1.

The relationship between these different standards is far from clear and there appears to be significant overlap. Turning to the most prominent standards in the General Comments: core obligations and respect, protect and fulfil, CESCR uses identical examples to illustrate these two standards. As seen above, laws on minimum wage are classified as both core obligations and obligations to protect. But there is not a perfect overlap between these two standards. Under the obligation to fulfil states are encouraged to establish non-contributory social security programmes for informal workers, but this is not identified as a core obligation. Thus, there is some substantive difference between these standards but precisely how they differ is not readily apparent. The time element may be a possible difference: core obligations are immediately enforceable whereas the typology of duties, particularly the obligation to fulfil, has been linked to progressive realization. However, CESCR has not explored this in any detail. In the Concluding Observations, when the standards do overlap, CESCR does not articulate the type of violation. On what basis does CESCR conclude that social assistance rates are inadequate in Canada: core obligation or obligation to fulfil?<sup>68</sup> Furthermore, despite the multiple standards developed in the General Comments, in the Concluding Observations it is often unclear what, if any, standard CESCR is using to identify areas of concern. This contradicts the CESCR's own advice to take account of the General Comments in the periodic reporting process. As another layer of confusion, when discussing "Violations" CESCR draws on the typology of duties, acts of commission/omission and progressive realization, but it makes no reference to core obligations.

Prior to the OP-ICESCR there was no prominent role for the maximum available resources/progressive realization standard. Reasonableness under OP-ICESCR may have reactivated these standards as resource allocation and the time frame for achieving socio-economic rights are facets of reasonableness. There are glimmers of this in *Rodriguez* where CESCR accepted the state's allocation of resources as a reasonable use of public funds. But how does reasonableness fit with core obligations and respect, protect and fulfil? The individual decisions make no mention of these other standards. Griffey optimistically observes 'that reasonableness has not changed the obligations imposed by the [ICESCR].'<sup>69</sup> Similarly the Office of the High Commissioner for Human Rights (OHCHR) had held that reasonableness was always a part of the maximum available resources/progressive realisation standard.<sup>70</sup> But CESCR does not meaningfully employ these standards in the General Comments or Concluding Observations, so there is still uncertainty on how reasonableness functions with the evaluative tools it actually uses. If the state has failed to achieve a core obligation or violated the obligation to respect, protect and fulfil could this amount to unreasonableness under ICESCR?

Searching for a unifying conception to monitoring of ICESCR is arguably futile as the different standards it uses are in response to different, albeit interlocking, problems related to, *inter alia*, the justiciability of socio-economic rights. Although Bilchitz has observed that it is difficult to uncover CESCR's precise reasoning, it is possible to identify general motivations.<sup>71</sup> Maximum available resources/progressive realization acknowledges the role of budgets and time in the implementation of ICESCR. The minimum core/core obligations aim to give a determinacy so as to be easily able to identify breaches of ICESCR. The typology of obligations demonstrates that similar to civil and

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<sup>68</sup> 'CO: Canada' supra note 23 at para 29.

<sup>69</sup> Griffey supra note 59 at 322.

<sup>70</sup> Note prepared by the Secretariat, 'The Use of the "Reasonableness" Test in Assessing Compliance with International Human Rights Obligations', 1 February 2008, A/HRC/8/ WG.4/CRP.1.

<sup>71</sup> Bilchitz, *Fundamental Rights* supra note 19 at 185.

political rights, there are elements of socio-economic rights that are immediately enforceable. And lastly, the reasonableness standard recognizes that the state has the discretion to employ a range of measures.

In sum, CESCR uses all of these methods concurrently to enhance socio-economic rights. Monitoring ICESCR is multi-faceted and equal parts robust, confusing and pragmatic. In practice, CESCR ignores the monitoring standards established in the text of treaty and has developed its own approach. It primarily relies on the core obligations and the typology of duties, but it is not consistent in applying these standards when reviewing the state's implementation of ICESCR. There are many potential explanations for these inconsistencies: information provided by the state or CSOs in the periodic reporting process, the interests of individual members of the Committee or even the politics of the international human rights system. The goal here is not to understand the root causes of the Committee's inconsistent use of these standards but simply to grasp the Committee's different approach to monitoring. With this map in place, it is now time to turn to see if CESCR is able to use this multi-faceted approach to comprehensively hold state's accountable for women's socio-economic rights.

### *III. The Need for Gender Sensitive Monitoring Standards*

A cursory glance at the General Comments and Concluding Observations suggests that even in this chaotic monitoring framework, CESCR is able to monitor women's socio-economic rights. Many times it expresses concerns on women's rights. A careful analysis, however, reveals that without a gender equality framework, either integrated into the current standards or as a stand-alone framework, CESCR is not able to comprehensively monitor ICESCR from a gender perspective. Although, the observation that CESCR has not fully engendered ICESCR has been made before, this has largely been made in relation to the normative content of the rights in the treaty.<sup>72</sup> This section briefly analyses the Concluding Observations from Canada, Kenya and Namibia and the latest two General Comments to make the case that part of the problem is that CESCR has not adopted a gender sensitive approach to monitoring women's socio-economic rights.

On the positive side, the latest General Comments make numerous references to how women experience violations of the right to fair and just working conditions and the right to sexual and reproductive health. CESCR identifies key ways that women's rights are undermined—maternal mortality, lack of access to abortion, forced marriage and marital rape—and provides recommendations on how these issues can best be addressed—repealing laws, ensuring access to information, goods and services, and addressing stereotypes.<sup>73</sup> Similarly in the General Comment on the right to just and fair working conditions, CESCR calls on states to address the gender wage gap, sexual harassment, maternal and parental leave, the working conditions of domestic workers and unpaid work.<sup>74</sup>

The problem is that CESCR has never articulated or explicitly used any tools to explain why these are violations of Article 2(2) (non-discrimination), Article 3 (equality), Article 7 (right to work) and Article 12 (right to health) of ICESCR. The areas of concern that CESCR emphasize and its

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<sup>72</sup> Fredman, 'Engendering' supra note 4.

<sup>73</sup> 'General Comment No. 22' supra note 35 at para 25-29.

<sup>74</sup> 'General Comment No. 23' supra note 35 at paras 11-17, 32, 47(a), 47(f).

recommendations of best practice highlight crucial areas of gender inequalities but CESCER fails to articulate with any degree of precision a background theory explaining why the examples provided undermine ICESCER. The General Comments are essentially just examples of gender inequalities. A example helps illustrate this problem. In the General Comment on the right to sexual and reproductive health, CESCER notes that substantive equality requires that the ‘barriers that particular groups may face [need to be] addressed.’<sup>75</sup> Gender stereotypes on care giving roles are identified by CESCER obstacles to women’s equal right to sexual and reproductive health.<sup>76</sup> It is correct to note that cultural attitudes are a prominent barrier, but CESCER’s does not give any framework or tools for identifying other barriers or emerging obstacles to women’s socio-economic rights. Without any framework states do not have the necessary guidance to be able to identify the specific and unique obstacles that exist within their domestic context and CESCER is not able to comprehensively monitor the implementation of ICESCER. CESCER’s prior General Comments that specifically examine gender equality and non-discrimination, similarly, focus on providing examples of best practices states should pursue and do not develop any analytical tools for evaluating state compliance with Article 2(2) and Article 3.<sup>77</sup> The General Comments on equality and non-discrimination are analyzed in greater detail in Section V.

The Concluding Observations repeat the problems found in the General Comments. CESCER does addresses both entrenched problems and even some newer obstacles to gender equality, such as gender-based violence, discrimination in customary laws and the plight of migrant domestic workers.<sup>78</sup> It also specifically highlights that steps to realize socio-economic rights such as anti-poverty measures, legal aid and water programmes need to be targeted towards women.<sup>79</sup> However, there is still significant room for improvement. There is no reference to the gender dimensions in relation to social security, food, housing or land. References to gender inequalities still tend to centre on the most obvious examples such as gender-based violence and gender pay gaps. In Kenya, CESCER only mentions in passing that pregnant learners are more likely to drop-out of school without identifying the specific barriers that are obstructing equality in the right to education. For instance, it does not assess if student drop-out because of inadequate daycare or breast-feeding facilities at school or if negative stereotypes from students and teachers pressure pregnant girls and new mothers into leaving school. Similarly, in relation to Namibia and Canada, as mentioned in Section I, CESCER overlooks discussing de facto pressing obstacles to women’s sexual and reproductive health. There may be many reasons that explain these oversights, such as CSOs not bringing these issues to the attention of the CESCER.<sup>80</sup> However, the ability of the Committee to comprehensively monitor women’s socio-economic rights would be improved with monitoring tools that are gender sensitive.<sup>81</sup>

#### *IV. A Dual Approach to Monitoring Women’s Socio-Economic Rights*

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<sup>75</sup> ‘General Comment No. 22’ supra note 35 at para 24.

<sup>76</sup> Ibid at para 27.

<sup>77</sup> ‘General Comment No. 16’ supra note 3 and CESCER, ‘General Comment No. 20: Non-discrimination in economic, social and cultural rights’ (2009) E/C.12/GC/20.

<sup>78</sup> ‘CO: Canada’ supra note 23 at para 21, 33; ‘CO: Kenya’ supra note 24 at para 25, 33, 37; ‘CO: Namibia’ supra note 25 at 27, 45.

<sup>79</sup> ‘CO: Canada’ supra note 23; ‘CO: Kenya’ supra note at para 10; ‘CO: Namibia’ supra note 25 at para 61.

<sup>80</sup> Meghan Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart, forthcoming)

<sup>81</sup> Sandra Fredman and Beth Goldblatt, ‘Discussion Paper: Gender Equality and Human Rights for Progress of the World’s Women 2015-2016’ (UN Women, 2015) 12.

Having mapped out CESCR's current approach and sifted rhetoric from reality on the monitoring of socio-economic rights and demonstrated the need for a gender sensitive approach, it is now possible to return to the central question and assess how gender equality fits into the monitoring of ICESCR. There are two potential approaches: (i) incorporating equality into the maximum available resources/progressive realization standard, the core obligations, the typology of duties and reasonableness; or (ii) establishing gender equality as a separate standard of review.

There are pros and cons of each position. Practically, incorporating gender equality into the already established standards avoids creating a further tool in what is already a crowded monitoring field. It also avoids the complications of figuring out how gender equality functions with other standards. However, streamlining equality into the other standards runs a significant risk that gender equality in the implementation of socio-economic rights will continue to be overlooked. On a more principled basis, it may be conceptually illogical to integrate equality into other monitoring mechanisms and there may still be gaps in identifying breaches of Article 2(2) and 3. Establishing gender equality as a separate accountability tool could offer a more focused approach to women's socio-economic rights. On the downside, this could add to the work load of the already under-funded and over-worked CESCR.

To determine which option offers the best approach, this section begins by considering how to incorporate gender equality into the current monitoring standards. At the outset, it is also helpful to remember the purpose of monitoring standards: it is a tool that identifies when a state has failed to uphold its ICESCR commitments. The purpose of the analysis here is to examine if gender equality either as a stand-alone standard of review or united with the other monitoring standards is able to comprehensively and with a high degree of precision identify when the state has not fulfilled its obligation under Article 2(2) and 3 of ICESCR. To answer this question, this section examines the relationship between gender equality and all the standards CESCR discusses and actually uses.

This section concludes that a gender equality framework enhances the monitoring of ICESCR process in multiple and complementary ways. Gender equality can and should be incorporated into the existing monitoring standards. Paying attention to how current monitoring approaches can shine a spotlight on gender inequalities will immensely enrich women's socio-economic rights. However, as demonstrated in Section II, each standard is targeted towards measuring different aspects of the realization of socio-economic rights. This means that none of the monitoring standards even when enriched with gender equality are able to capture *all* the ways women experience violations of their socio-economic rights. Under the current approach crucial aspects of gender inequality will remain in the shadows. Thus, there also needs to be an independent standard of review that can detect the various and nuanced ways in which women's socio-economic rights are undermined. Although this may add to the work of the Committee, the alternative that the violations of women's socio-economic rights remain invisible is unacceptable. The most comprehensive and coherent approach is to pursue both of the options identified above: to incorporate gender equality as far as possible into the current monitoring standards and to establish a separate gender equality framework.

(i) *Maximum Available Resources/Progressive Realization*

As more resources become available, the obligation on the state to progressively realize socio-economic rights increases. Maximum available resources/progressive realization is potentially a robust analysis that examines the development and allocation of resources and measures the state's

efforts over a period of time. Although this standard has in practice been ignored by CESCR, scholarship has focused on three specific areas: (i) assessing the state's available revenue and resources, for example, by looking at the state's tax-structures,<sup>82</sup> the availability of resources through international co-operation<sup>83</sup> and even non-financial resources;<sup>84</sup> (ii) examining the allocation of resources, particularly through analyzing if the state's budget has provided sufficient funds to operationalize socio-economic rights;<sup>85</sup> and (iii) developing benchmarks to measure the state's progress.<sup>86</sup>

There are potential benefits to integrating maximum available resources/progressive realization and gender equality. The development and allocation of resources can significantly re-entrench women's disadvantage. International co-operation and assistance can come with criteria which limit gender equality such as by refusing to fund sexual and reproductive health services<sup>87</sup> or requiring the government to cut fundamental public services which women disproportionately rely on.<sup>88</sup> Tax structures can incentivize women to not work in the labour market.<sup>89</sup> Similarly, the process taken to progressively realize rights can discriminate against women.<sup>90</sup> Adding a gender equality lens to the maximum available resources/progressive realization standard will ensure that the state takes account of gender inequalities when developing and budgeting the state's resources and that benchmarks used to monitor the progressive realization take full account of women's disadvantage. Integrating these two standards has already begun with significant work being done to ensure budgets are gender and human rights compatible.<sup>91</sup>

While gender equality can enhance the assessment of the state's maximum available resources/progressive realization, there are limitations to using this enriched standard to detect breaches of women's socio-economic rights. A maximum available resources/progressive realization/gender equality analytical lens will not capture crucial aspects of gender inequality, such as: how legislation strips women of their legal status and benefits when they marry a non-national<sup>92</sup>; the non-criminalization of marital rape;<sup>93</sup> the non-recognition of unpaid work in divorce proceedings;<sup>94</sup> the lack of legal protection for de facto unions;<sup>95</sup> criminalizing health services only

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<sup>82</sup> UN Special Rapporteur on extreme poverty and human rights, 'Fiscal and tax policy' (2014) A/HRC/26/28.

<sup>83</sup> Magdalena Sepúlveda Carmona, 'The Obligations of "International Assistance and Cooperation" under ICESCR: A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8' (2009) 13 *The Intl J of Hum Rts* 86.

<sup>84</sup> Sigrun Skogly, 'The Requirement of Using the Maximum Available Resources for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12(3) *HRLH* 393.

<sup>85</sup> Aoife Nolan 'Budget Analysis and Economic and Social Rights' in E. Riedel et al (eds) *Contemporary Issues in the Realisation of Economic, Social and Cultural Rights* (OUP, 2014).

<sup>86</sup> Lillian Chenwi, 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) *De Jure* 742.

<sup>87</sup> General Comment No. 22 *supra* note 35 at para 52.

<sup>88</sup> Helena Smith, 'IMF Threatens to Pull Out of Greece Rescue' *The Guardian* (9 May 2016)

<<https://www.theguardian.com/world/2016/may/08/rioters-take-to-the-streets-ahead-of-greek-austerity-vote>>

<sup>89</sup> Dianne Elson, 'Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW' (UNIFEM, 2008) 4.

<sup>90</sup> Ben Saul et al, *ICESCR: Cases, Commentary and Materials* (OUP, 2014) 204.

<sup>91</sup> Debbie Budlender et al (eds), *Gender Budgets Make Cents: Understanding Gender Responsive Budgets* (Commonwealth Secretariat, 2002).

<sup>92</sup> Committee on the Convention on the Elimination of Discrimination Against Women, 'CO: Jordan' (2012) CEDAW/C/JOR/CO/5/ [33].

<sup>93</sup> CEDAW Committee, 'CO: Haiti' (2016) CEDAW/C/HTI/CO/8-9 [21].

<sup>94</sup> CEDAW Committee, 'CO: Japan' (2016) CEDAW/C/JPN/CO/8-9 [48].

women require;<sup>96</sup> or different ages of marriage for men and women.<sup>97</sup> Although these examples are seemingly violations of civil and political rights, there are also violations of ICESCR and undermine women's equality under Article 6 (the right to work) Article 10 (protection of the family) Article 11 (adequate standard of living) and Article 12 (health). An independent gender equality analysis would easily be able to capture these problems. When equality is tied to maximum available resources/progressive realization standard this narrows the scope of the analysis. The two standards in tandem can only examine gender equality in connection with resources. It is unable to see gender inequalities that impact on socio-economic rights that are outside of that remit, for example inequalities that are based in law or socio-cultural misrecognition.

There are also conceptual difficulties in using gender equality and maximum available resources/progressive realization to identify breaches of Article 2(2) and 3 due to their fundamentally different approaches to the timing of the obligation. Maximum available resources/progressive realization is measuring the implementation of socio-economic rights over a period of time. Equality is an *immediate* obligation.<sup>98</sup> The UN Working Group on Discrimination Against Women in Law and Practice forcefully holds: 'women's right to equality in economic and social rights is substantive, immediate and enforceable. It concerns the division of existing resources, not the development of resources, and therefore the principle of progressive realization does not apply.'<sup>99</sup> Progressive realization is essentially a forward looking standard and is not able to diagnosis fundamental gender equality harms because equality is an *immediate* obligation. This is a significant obstacle to integrating these two standards. Some commentators have tried to find a way through this impasse and argued that only certain aspects of equality are immediately enforceable. Porter draws on the typology of duties and argues that states have an obligation to immediately respect and protect the right of non-discrimination. The obligation to fulfil equality through positive action is 'subject to available resources and progressive realization.'<sup>100</sup> Similarly, Saul et al in their commentary on ICESCR explain CESCR's holds that de jure discrimination must be removed immediately while 'failure to achieve de facto equality immediately may, in exceptional cases, be justified on the basis of a lack of available resources.'<sup>101</sup> On this understanding, there is potential to further connect progressive realization and gender equality.

The latter approach while offering a route to full integration is problematic because it risks undermining important gains in the evolution of equality. First, as Otto observes connecting obligations to fulfil to women's equality under Article 3 implies that the other disadvantaged groups referred to in Article 2(2), such as religious and ethnic minorities, only enjoy 'the limited negative protection of non-discrimination.'<sup>102</sup> Due to the structure of ICESCR, fracturing equality and non-discrimination means that the state only has a positive obligation to achieve gender equality but no similar obligation to other disadvantaged identity groups. This interpretation runs contrary to the

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<sup>95</sup> 'CO: Haiti' supra note 93 at para 49.

<sup>96</sup> Working Group on Discrimination Against Women in Law and Practice, 'Discrimination against women with regards to health and safety' (2016) A/HRC/32/44 [29].

<sup>97</sup> CEDAW Committee, 'CO: Tanzania' (2016) CEDAW/C/CO/TZA/7-8 para 43.

<sup>98</sup> CESCR, 'General Comment No. 16' supra note at para 16.

<sup>99</sup> 'Working Group, 'Economic and social life' supra note 55 at para 8.

<sup>100</sup> Porter, 'Re-thinking' supra note 64 at 2.

<sup>101</sup> UN General Assembly, Draft International Covenants on Human Rights: Report of the Third Committee A/5365 (17 December 1962); See also Saul et al (n 90) 204-05.

<sup>102</sup> Otto supra note 6 at 37.



intentions of the drafters, who specifically rejected subjecting non-discrimination to progressive realization.<sup>103</sup>

Second, this approach seemingly splits non-discrimination and equality into two separate concepts which is not consistent with international human rights law. CESCR observes that non-discrimination and equality are ‘integrally related and mutually reinforcing.’<sup>104</sup> The definition of discrimination adopted by CESCR, which draws on the definition of discrimination in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), holds that discrimination against women is any distinction made on the basis of sex which impairs the enjoyment ‘on the basis of *equality* of men and women of human rights.’<sup>105</sup> The state is obligated to ensure that rights are enjoyed without discrimination and through the interpretative work of CESCR this means the state is required to ensure that any distinctions do not impede equality in socio-economic rights. If a distinction does not uphold or further equality there has been discrimination. At international human rights law, equality is at the heart of discrimination. These two concepts are intimately connected together. Thus, attempts to divide non-discrimination and equality between immediate and progressive realization are conceptually impossible.<sup>106</sup>

Third, another potential unintended consequence is that fracturing equality between immediate and progressive components potentially unravels the rich concept of equality that has been developed by, *inter alia*, the treaty bodies. CESCR observes that ‘guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but *interconnected* concepts.’<sup>107</sup> Formal equality is closely tied, but not equated, to obligations of respect. Connecting immediacy/obligations of respect/non-discrimination strongly implies that the state only has an immediate obligation to achieve formal equality. Substantive equality, which is closely associated with the obligation to fulfil, only has to be progressively realized. It implies that states are only under an immediate obligation to remove de jure barriers. There is no requirement on the state to immediately interrogate the current allocation of resources and the structure of laws, policies and programmes that entrench women’s disadvantage. While CESCR does allow for states to justify the failure to eliminate substantive inequality in *extremely* exceptional circumstances of resource constraint, it does not permit the state to refrain from taking immediate steps to redress substantive equality.<sup>108</sup> Linking equality/obligation to fulfil/progressive realization characterizes substantive gender equality as some distance, quasi-unattainable goal that women must wait to enjoy. This potentially ignores the many aspects of substantive gender equality can be easily achieved with a reconfiguration of the state’s priorities and resources.

An example helps explain the possible danger of dividing equality among immediate and progressive lines. Maternal mortality is still shockingly high in many countries around the world<sup>109</sup>

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<sup>103</sup> Saul et al supra note 90 at 203-205.

<sup>104</sup> General Comment No. 20 supra note 79 at para 3.

<sup>105</sup> General Comment No. 16’ supra note 3 at a para 11; 1249 UNTS 13 [entered into force 3 September 1981] Article 1.

<sup>106</sup> Otto supra note 6 at 36.

<sup>107</sup> ‘General Comment No 16’ supra note 3 at para 7.

<sup>108</sup> ‘General Comment No. 20’ supra note 77 at para 13.

<sup>109</sup> *Millennium Development Report: 2015* (2015) 38-43

<[http://www.un.org/millenniumgoals/2015\\_MDG\\_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf)>

and these deaths are easily preventable.<sup>110</sup> Maternal mortality is often not due to de jure or formal inequalities but the result of entrenched and systemic inequalities.<sup>111</sup> Addressing maternal mortality does not involve developing resources but the state taking seriously their commitment to gender equality and properly funding maternal health programmes.<sup>112</sup> However, characterizing the obligation to fulfil equality as a progressive obligation means the state has space to continue to justify high rates of maternal mortality. This is a tragic and pressing issue of substantive gender equality that can and should be immediately addressed. The potential for maternal mortality and other similar under-prioritized aspects of substantive gender equality to be postponed through dividing the timing of equality obligations should give serious pause to adopting this approach. Equality can and should enhance the calculation of the state's resources and the steps taken to fully realize socio-economic rights, but gender equality cannot be subject to progressive realization.

Rejecting obligations to fulfil equality as a progressive obligation does raise questions on the proper relationship between equality and time in ICESCR. It is principally, strategically and pragmatically important to stress that gender equality is an immediate obligation. However, women's disadvantage in socio-economic rights is often due to deeply embedded patriarchal and oppressive norms and structures. Modifying these norms and structures is a process that can require time. The CEDAW Committee's approach to monitoring gender equality is illuminating here. It requires that the state to: (i) *immediately* assess de jure and de facto situation of women; and (ii) *immediately* take concrete steps to formulate and implement a policy that 'is targeted as clearly as possible towards' achieving substantive equality.<sup>113</sup> Byrnes explains 'the obligation to adopt a policy is an immediate one...[but] the obligation...also is continuing and includes the responsibility to monitor progress and adjust the policy as time passes.'<sup>114</sup> The state is not setting a timetable for when to progressively realize achieve gender equality but instead 'the emphasis is on movement forward...to build on [appropriate] measures continuously in the light of their effectiveness and new or emerging issues, in order to achieve the treaty's goals.'<sup>115</sup> Given the importance of harmonization within the UN system<sup>116</sup> and CESCR fruitful history of drawing on the work of the CEDAW Committee,<sup>117</sup> CESCR can adopt a similar approach and can immediately evaluate the state's policy to achieve gender equality. This is a more coherent approach to monitoring Article 2(2) and Article 3 of ICESCR than fracturing equality into immediate and progressive components.

## (ii) *Minimum Core and Core Obligations*

There is no accepted definition of the minimum core, as such there is potential to make a case that the minimum core should be defined as gender equality. Young's critique of equating the minimum core with normative concepts although it referred to equality focused mostly on dignity. By equating the minimum core to gender equality, the state has not fulfilled ICESCR if it has not immediately

<sup>110</sup> UN Special Rapporteur on the right to health, 'The right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (2006) A/61/338; WHO, 'Maternal mortality' <<http://www.who.int/mediacentre/factsheets/fs348/en/>>.

<sup>111</sup> Alicia Yamin, 'From Ideals to Tool: Applying Human Rights to Maternal Health' (2013) 10(11) PLOS Medicine.

<sup>112</sup> Working Group, 'Health and Safety' supra note 96.

<sup>113</sup> CEDAW Committee, 'General Recommendation No. 28 on core obligations' (2010) CEDAW/C/GC/2010 [24].

<sup>114</sup> Andrew Byrnes, 'Article 2' in Marsha Freeman et al, *CEDAW: a commentary* (OUP, 2012) 76-8.

<sup>115</sup> 'General Recommendation No. 28' supra note 113 at para 24.

<sup>116</sup> OHCHR, 'Harmonized Guidelines on Reporting to the Treaty Bodies' <<http://www.ohchr.org/EN/HRBodies/Pages/HarmonizedGuidelines.aspx>>

<sup>117</sup> 'General Comment No. 16' supra note 3.

guaranteed gender equality in socio-economic rights. Both gender equality and minimum core are immediate obligations, so unlike maximum available resources/progressive realization, there is logic in tying these two standards together. Moreover, integrating these tools emphasizes the immediacy of gender equality. In theory a minimum core/gender equality standard would be able to detect the numerous ways that women's socio-economic rights are violated as an equality framework is doing the analytical "heavy-lifting." Prima facie, CESCR appears to be embracing this approach as it routinely holds that non-discrimination and gender equality are core obligations.<sup>118</sup>

Similar to maximum available resources/progressive realization, there are practical risks to collapsing minimum core and gender equality. Liebenberg notes that the minimum core/core obligation implies that there are non-core obligations that are subject to progressive realization.<sup>119</sup> This again raises the risk that equality will become fractured between core and non-core components. The temptation will be to see formal equality as a core obligation and substantive equality as non-core. This raises the similar issues discussed above in relation to dividing equality between immediate and progressive elements: that substantive equality will continue to be postponed and not treated as an immediate obligation. Exclusively equating the minimum core with gender equality may also limit to scope of protection under ICESCR. If gender equality is the minimum core the state has to achieve, this might exclude other disadvantaged groups from immediate protection of socio-economic rights.

### (iii) *Typology of Duties*

The typology of duties is a tool for categorizing and understanding the nature of the state's obligations. The CEDAW Committee regularly relies on this typology in the General Recommendations to explain why states have not upheld women's rights under CEDAW.<sup>120</sup> This suggests that there is a close connection between monitoring gender equality and the typology of duties.

As Shue has recognized, the typology of duties is not a complete solution.<sup>121</sup> It is an 'abstract tool for describing multi-layered duties that arise from rights.'<sup>122</sup> While it helpfully classifies the decriminalizing abortion as an obligation to respect and ensuring the justice system is sensitive to gender-based violence as an obligation to protect, the typology is not able to identify why these undermine women's right to sexual and reproductive health. When reviewing a state's action and inactions in the broad areas of life protected under ICESCR, the typology of duties functions to classify measures. The limits of the obligations to respect, protect and fulfil is apparent when facing emerging challenges to women's socio-economic rights. Does the banning of the niqab violate girls and women's right to education?<sup>123</sup> Does it undermine women's health to limit the prosecution of gender-based violence perpetuated by nationals abroad only to cases where the act is not criminalized in the country where it is committed?<sup>124</sup> Does restricting the level of foreign funding for CSOs impact on women's adequate standard of living?<sup>125</sup> The typology of duties was not designed

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<sup>118</sup> 'General Comment No. 23' supra note 35 at para 55(a); CESCR, 'General Comment No. 21: the right of everyone to take part in cultural life' (2009) E/C.12/GC/21 [59a].

<sup>119</sup> Sandra Liebenberg, *Socio-Economic Rights: Adjudicating Under a Transformative Constitution* (Juta, 2010).

<sup>120</sup> CEDAW Committee, 'General Recommendation No. 28' supra note 113 at para 9.

<sup>121</sup> Henry Shue, *Basic Rights* (PUP, 1996) 160.

<sup>122</sup> Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP, 2009) 101.

<sup>123</sup> CEDAW Committee, 'CO: France' (2016) CEDAW/C/FRA/CO/7-8 [31].

<sup>124</sup> Ibid at para 23.

<sup>125</sup> CEDAW Committee, 'CO: Ethiopia' (2011) CEDAW/C/ETH/CO/6-7 [29(b)].

and is not able to answer these questions. It is necessary to have an equality monitoring standard that detects gender inequalities and then the typology of duties can helpfully characterize the nature of the state's obligation to improve women's socio-economic rights. These two standards are complementary but it is essential to have an equality framework to detect the underlying lack of implementation of women's socio-economic rights.

#### (iv) Reasonableness

Reasonableness is a 'flexible and context sensitive basis for evaluating socio-economic rights claims' and there is space to integrate the two standards.<sup>126</sup> CESCR has specifically stated that it will assess under reasonableness, if the states actions are non-discriminatory. In *Rodriguez* it did briefly examine if the state had discriminated as between prisoners and non-prisoners but this was not a fully-fleshed out analysis. Porter notes the close practical connection between these two standards. He observes that it 'will be difficult to identify any claims from vulnerable groups suffering...that could not also be framed as non-discrimination.'<sup>127</sup> In the South African context, the Constitutional Court affirmed the centrality of equality in the assessment of reasonableness.<sup>128</sup> There has been criticism that the Court has not fully integrated equality into the reasonableness standard<sup>129</sup>, but for the purposes here, it is sufficient to note the drive towards conceptualizing inequalities in socio-economic rights as unreasonable.

Enriching reasonableness with gender equality raises a similar problem with the typology of duties. Reasonableness on its own does not detect violations of women's socio-economic rights. It is an elastic concept and not able to answer the questions posed above on the relationship between women's socio-economic rights and the niqab, extraterritorial jurisdiction or foreign funding of CSOs. There needs to be a fully developed equality standard that can then be incorporated into the reasonableness approach if the OP-ICESCR is going to seriously assess women's claims to socio-economic rights.

#### (v) Conclusions

Drawing the threads together, the best approach to the monitoring of women's socio-economic rights is to: (i) incorporating gender equality framework into the current monitoring standards; and (ii) establishing an independent monitoring tool designed specifically to capture gender inequalities. There are significant benefits to enriching the current monitoring tools with gender equality. Maximum available resources/progressive realization and core obligations are more effective standards when they pay attention to the gender dimensions of developing and allocating resources and ensuring minimum standards for socio-economic rights. However, this is not a complete approach to ensuring compliance with Article 2(2) and 3. Principally, the maximum available resources/progressive standard cannot detect all the potential non-compliance of women's socio-economic rights and there is an inconsistency in the timing of the obligations. Pragmatically, linking

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<sup>126</sup> Sandra Liebenberg 'Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review' in John Squires et al *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (UNSW Press, 2005) 73-88.

<sup>127</sup> Bruce Porter, 'The Reasonableness of Article 8(4): Adjudicating Claims from the Margin' (2009) 27(1) Nordic J Human Rights 39, 49.

<sup>128</sup> *Republic of South Africa v Grootboom*, (CCT 11/00) [2000] ZACC 19.

<sup>129</sup> David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence' (2003) 19 SAJHR 1.

gender equality to maximum available resources/progressive realization and core obligations runs the significant risks of minimizing the state's obligation to achieve substantive gender equality in women's socio-economic rights. While the typology of duties helpful characterizes the nature of the states obligations towards women and the reasonableness standard is flexible enough to pay specific attention to gender inequalities, to be relevant to women's socio-economic rights both depend on having a fully developed gender equality monitoring tool. Thus, it is necessary to also develop a tool that is specifically designed to capture gender inequalities in socio-economic rights.

Arguing for a dual approach to monitoring women's socio-economic rights does add an additional standard and may impact the workload of CESC. In part this is necessary because of CESC's complex and multi-faceted approach to monitoring. Even though this proposed approach may come with a slight drawback, ensuring that the gender dimensions of socio-economic rights are properly identified outweighs this. Moreover, it puts CESC in a strong position to constructively dialogue with the state and propose tailored and compelling recommendations.

## V. *A Gender Equality Monitoring Framework*

The next task is to derive at a gender equality monitoring standard. The starting place is to assess how the text, context and object and purpose of ICESCR shape the definition of gender equality.<sup>130</sup> This section examines the treaty, the *travaux préparatoires*, General Comments, the approach of the CEDAW Committee and academic proposals on how to monitor women's rights under ICESCR. It argues that Fredman's four dimensional model of equality offers an easy to use but sophisticated monitoring tool and demonstrates how this model can work in practice.

### (i) *ICESCR and CESC*

The starting place is the text of the treaty but similar to the other UN treaties, ICESCR does not define equality. The *travaux préparatoires* do not discuss monitoring Article 2(2) and 3 and only shed minimal light on the meaning of equality in ICESCR. The drafters focused on only a few select issues: would affirmative action measures be permitted under Article 2(2) of ICESCR?; is a provision on gender equality redundant given that the treaty prohibits gender discrimination?; is non-discrimination subject to progressive realization?; and is the state required to prohibit discrimination committed by a private individual?<sup>131</sup>

It has been left to CESC to develop the meaning of equality. Although its interpretation is not binding, it does have significant authoritative weight. CESC firmly holds that ICESCR includes both formal and substantive equality. Formal equality 'is achieved if a law or policy treats men and women in a neutral manner.'<sup>132</sup> CESC briefly explains that substantive equality 'is concerned with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups' experience.'<sup>133</sup> Although this definition

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<sup>130</sup> See Article 31-33 of the Vienna Convention on the Law of Treaties 115 UNTS 331(entered into force 27 January 1980).

<sup>131</sup> Yvonne Klerk, 'Working Paper on Article 2(2) and Article 3 of ICESCR' (1987) 9 HRQ 250

<sup>132</sup> 'General Comment No. 16' supra note 3 at para 7.

<sup>133</sup> *ibid*.

importantly focuses on pre-existing disadvantage, it is not a robust concept of substantive equality, particularly in comparison with the CEDAW Committee's definition, discussed below.<sup>134</sup>

As demonstrated in Section II, CESCRR has not yet translated these broad statements into a comprehensive evaluative tool. It is possible to glean from the General Comments several components that could form the basis of an evaluative tool. It has called on states to:

- Pay attention to existing gender inequalities
- Address gender stereotypes
- Eliminate systemic discrimination
- Identify appropriate indicators and benchmarks
- Develop a plan of action
- Take temporary special measures<sup>135</sup>

### (ii) *CEDAW and the CEDAW Committee*

As the leading instrument on women's rights, it is helpful to also look at how CEDAW and the CEDAW Committee define equality and monitor the implementation of women's right. Again surprisingly, CEDAW does not define equality, but similar to CESCRR the CEDAW Committee holds that it includes formal and substantive equality. The CEDAW Committee takes a multi-faceted approach to substantive equality. It has defined it as requiring: differential treatment; an equal start; 'equality of results'; 'overcoming the underrepresentation of women and a redistribution of resources and power between men and women'; '[to] make choices without the limitation set by stereotypes, rigid gender roles and prejudices'; and 'real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.'<sup>136</sup> While the CEDAW Committee is at the forefront in upholding women's rights, it has been criticized for not translating this rich concept of equality into a monitoring framework.<sup>137</sup> There have been proposals, drawing on Fredman's four dimensional model of equality, on how best to convert the Committee's understanding of equality into an analytical tool.<sup>138</sup>

### (iii) *Other Proposals*

There is a small body of academic commentary discussing the monitoring of Article 2(2) and 3. Recently, Chinkin has proposed criteria that a state would have to meet to uphold girl's equal right to education.<sup>139</sup> Her proposal is very specific to the education context and is not a designed to evaluate state's compliance with gender equality and all of the socio-economic rights in ICESCR.

Otto has also proposed framework but in practice her proposal is difficult to apply. It involves a series of classifications and questions: (i) is the measure gender neutral or differentiated? Does it treat sub-groups of women differently? (ii) Is the measure aimed to achieve structural equality? She

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<sup>134</sup> CEDAW Committee, 'General Recommendation No. 28' supra note 112.

<sup>135</sup> 'General Comment No. 16' supra note at para 8, 11, 38, 39.

<sup>136</sup> CEDAW Committee, 'General Recommendation No. 25: on temporary special measures' (2004) CEDAW/C/GC/24 [8], [9]; 'General Recommendation No. 28' supra note 112 at para 16, 22.

<sup>137</sup> Meghan Campbell, 'Women's Rights and CEDAW: Unlocking the Potential of the Optional Protocol' (2016) 34(4) Nordic J of Hmn Rts 247.

<sup>138</sup> *ibid.*

<sup>139</sup> Chinkin supra note 9 at 157-58.

proposes a long list of factors to achieve substantive equality that in essence mirror CESC and CEDAW Committee's description of substantive equality. This list is long, slightly repetitive and unyielding. Moreover, the list isn't organized to mediate tensions in different aspects of gender equality. For instance, at-home prenatal medical care may redress women's disadvantage in health care but re-enforce women's exclusion from public life, particularly in societies that are heavily gender segregated. Otto does not explain how her guidelines interact so as to identify and resolve these harms. The next steps, she proposes, are to ask: (iii) what is the qualitative outcome for women? for men? (iv) what is the qualitative outcome for subgroups of women? subgroups of men? (v) if substantive equality has not been achieved does the law need to be redesigned?<sup>140</sup> While, this is an essential component, her proposal is focused on outcomes which may overlook law, policies or programmes that on their face undermine substantive equality. For instance, there is a proposal in the UK only allowing women to receive child benefits for a third child when she can prove the third child is a consequence of sexual violence.<sup>141</sup> It is not entirely clear if Otto's proposed framework would be able to capture the recognition harms in the law that paint women in poverty as promiscuous, benefit-leeches or the gross invasion of privacy.

#### *(iv) A New Approach*

Fredman's four dimensional model of substantive equality overcomes these limitations and is an ideal framework for monitoring ICESCR. Her model pursues four-overlapping dimensions: breaking the cycle of disadvantage; promoting respect for dignity and worth; participation and accommodating difference by achieving structural change.<sup>142</sup> The first element, breaking the cycle of disadvantage, recognizes that individuals and groups have suffered because of their personal characteristics. To redress this imbalance, specific and positive measures are required, including temporary special measures. The second element addresses recognition harms such as: harassment, prejudice, stereotypes, stigmas, negative cultural attitudes, indignity and humiliation. Third, the participation dimension requires inclusion of women in all public, private, political and social decision making processes. Fourth, the structural dimension requires institutions rather than individuals to change.

This model draws together and synthesizes the factors that CESC refers to in the General Comments on equality and non-discrimination. It is not a definition but is specifically designed to be an evaluative tool to 'assist in modifying laws, policies and practices to better achieve substantive equality.'<sup>143</sup> As Fredman explains, 'the aim of the multi-dimensional approach is...an evaluative one, to provide a set of criteria to determine whether a law, policy or practice or institution is likely to fulfill the right to equality and points to ways in which they should be reformed better to do so.'<sup>144</sup> It is sophisticated but "user-friendly" which is crucial given the budget and time constraints of CESC.

Unlike previous proposals, Fredman's model can mediate tensions between facets of gender equality. Framing substantive equality in terms of dimensions 'focuses on the interaction and

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<sup>140</sup> Otto *supra* note 6 at 44, 49.

<sup>141</sup> Tom Batchelor, 'Government Accused of Using Trump Inauguration to Sneak Out Controversial Tax Credit "Rape Clause"' (22 January 2017) *The Independent* <<http://www.independent.co.uk/news/uk/home-news/government-bury-rape-clause-child-tax-credit-donald-trump-inauguration-victim-sexual-abuse-evidence-a7540351.html>>

<sup>142</sup> Sandra Fredman, *Discrimination Law* 2<sup>nd</sup> ed (Clarendon, 2011) 27-9.

<sup>143</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *Int'l J of Con L* 712

<sup>144</sup> *ibid* 713.

synergies’ between different elements ‘rather than asserting a pre-established lexical priority’<sup>145</sup> and when there are conflicts ‘the aim is to look for...compromise, rather than suggesting that substantive equality pursue one of the aims at the cost of obliterating the others.’<sup>146</sup> For instance, using this framework highlights how conditional cash transfers provide to women in poverty can address economic disadvantage but perpetuate misrecognition harms that women in poverty need incentives to provide education and health care to their children and that women are primary care-givers.<sup>147</sup> Achieving substantive equality and synergy between the four dimensions requires consultation with women in poverty and points towards unconditional cash transfers coupled with structural investment in public services. Fredman’s model of substantive equality has been highly influential. It has been adopted by UN Women in their latest flagship report<sup>148</sup> and is implicitly being relied upon by CESCER and other UN treaty bodies.<sup>149</sup>

(v) *Integrating Substantive Equality into the Monitoring of ICESCR*

The four dimensional model of equality can enrich the established standards and can function as an independent tool to ensure a comprehensive approach to monitoring ICESCR. Linking “maximum available resources/progressive realization” and Fredman’s substantive equality ensures that the development and allocation of resources and benchmarks and indicators promote women’s equality. For instance, a substantive equality lens, particularly the participation dimension ensures that women have a voice in setting progressive realization standards to ensure their needs are not overlooked. CESCER can call attention for the need for gender sensitive budgets and macroeconomic policies. The four dimensional model of equality becomes a crucial facet of core obligations. This connection stresses the immediacy of taking all appropriate measures to achieve gender equality. Drawing on the CEDAW Committee, CESCER can hold the state to account for immediately developing a national plan and implementation strategy that is based on substantive equality.

To ensure that ICESCR identifies all the ways women’s human rights are violated, the four-dimensional model can be applied as an independent monitoring tool. It can shine a bright spotlight on the relationship between gender and socio-economic rights. The dimensions and the interaction between them can comprehensively identify breaches of Article 2(2) and 3 of ICESCR. It can help ensure that CESCER does not have any blind spots. It directs CESCER to examine from four different dimensions—disadvantage, recognition, participation and structural—women’s right, *inter alia*, to food, water, housing and education. For instance, in the Concluding Observations for Kenya and Namibia, CESCER expresses concern about the high drop rates of children from school. Applying the equality monitoring tool requires CESCER to consider: (i) how the impact of direct or indirect school fees and domestic responsibilities negatively impacts girls right to education (disadvantage dimension); (ii) how do the attitudes of teachers and parents re-enforce stereotypes?; do girls experience violence to, from and at school? (recognition dimension); (iii) do schools have high-quality and culturally sensitive sanitation facilities for girls? (structural dimension); and (iv) has the state consulted with women and girls, including the most disadvantaged and marginalized groups

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<sup>145</sup> *ibid.*

<sup>146</sup> *ibid.* 728.

<sup>147</sup> Sandra Fredman, ‘Women and Poverty: A Human Rights Approach’ (2016) *African J of Int’l and Comp L* (forthcoming).

<sup>148</sup> UN Women, ‘Transforming Economies, Realizing Rights’ (2015) 42  
<[http://progress.unwomen.org/en/2015/pdf/UNW\\_progressreport.pdf](http://progress.unwomen.org/en/2015/pdf/UNW_progressreport.pdf)>

<sup>149</sup> Sandra Fredman and Beth Goldblatt *supra* note 81 at 12.



(participation dimension)?<sup>150</sup> For Canada, CESCER can highlight that efforts to address socio-economic disadvantage of indigenous peoples need to be sensitive inter-group differences. Indigenous women in Canada are among the most vulnerable groups in Canadian society.<sup>151</sup> CESCER can recommend that Canada be cognizant of this disadvantaged position and ensure that all programmes specifically address the nexus of gender and indigenous status (recognition dimension). In a similar vein, CESCER's discussion of land rights issues and harmful cultural practices in Namibia is almost entirely gender neutral. Using an independent equality monitoring tool, CESCER can encourage the state to undertake awareness raising programmes targeted to traditional leaders on women's rights to inheritance and ownerships and gender equality (recognition element) and facilitate dialogue between traditional leaders and women's organisations to promote internal reform of customary laws and harmful cultural practices (participation element). CESCER can then draw on the typology of duties to classify the state's nature of the steps the state should take. Removing gender discriminatory provisions in the Indian Act in Canada is an obligation to respect, and directing police officers to patrol the route girls take to school in Kenya is an obligation to protect women's land rights in Namibia by facilitating dialogue is an obligation to fulfil. The proposed independent framework provides the analytical richness necessary to complement the typology of duties and give meaningful content to the reasonableness standard.

## VI. Conclusion

The current approach to monitoring ICESCR is multi-faceted and complex. It can identify certain, but not all, violations of women's socio-economic rights. To address this shortcoming it is necessary to pursue a dual-strategy where (i) an independent equality framework is established; which (ii) can also be used to enrich the traditional monitoring tools. This article proposes that CESCER adopt Fredman's four dimensional model of equality for monitoring women's rights under ICESCR. By examining each of the rights in ICESCR from the perspective of women's disadvantage, gender recognition harms, structural and institutional barriers and participation, CESCER can hold states to account and ensure greater respect for women's rights.

It is important to acknowledge this is not a complete solution to all the problems of monitoring for women's socio-economic rights. There are still concerns on CESCER's consistency when reviewing the implementation of ICESCR. States and CSOs may not always provide the necessary information to conduct a robust substantive equality analysis. However, the framework does provide the tools to direct CESCER to ask the necessary question in the constructive dialogue process to overcome as far as possible any knowledge gaps. Even with the shortcomings of the international accountability system, the proposed dual approach to monitoring women's socio-economic rights is an important step forward in fully engendering ICESCR.

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<sup>150</sup> Sandra Fredman, Meghan Campbell and Jaakko Kusomanen, 'Transformative Equality: Making the SDGs Work for Women' (2016) 30(2) *Ethics & International Affairs* 177.

<sup>151</sup> The Committee, 'Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination Against Women under article 8 of OP-CEDAW' (2015) CEDAW/C/OP.8/CAN/1